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Benicia, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED SITE SERVICES OF
CALIFORNIA, INC.

and
TEAMSTERS LOCAL 315, IBT

Case 20-CA-139280
20-CA-149509

ORDER REMANDING

On March 17, 2016, Administrative Law Judge Dickie Montemayor issued a decision in this proceeding. Thereafter, exceptions and briefs were filed by the Respondent, the General Counsel, and the Charging Party.

The National Labor Relations Board has decided to remand this case to the judge for further findings, analysis, and conclusions consistent with this Order Remanding.

This case concerns the Respondent's purported permanent replacement of 21 employees who engaged in an economic strike in October 2014, and the Respondent's withdrawal of recognition from the Union on March 27, 2015. The complaint, *inter alia*, alleges that the Respondent's refusal to reinstate striking employees upon their unconditional offer to return to work violated Section 8(a)(3) and (1) of the Act because the Respondent had an "independent unlawful purpose" (within the meaning of *Hot Shoppes, Inc.*, 146 NLRB 802 (1964)) motivating its decision to hire permanent replacements. The complaint further alleges that the Respondent violated Section

8(a)(5) and (1) by withdrawing recognition from the Union. The complaint also contains four allegations that the Respondent violated Section 8(a)(3) and (1) by: (1) refusing to reinstate at least six unit employees because at least six employees claimed by the Respondent to be permanent replacements were not in fact permanent; (2) effectively terminating at least seven unit employees by informing the Union that it had hired permanent replacements for all employees on October 16, 2014, when the Respondent had not in fact permanently replaced all striking employees; (3) removing Walter Buckner, Daniel Ruiz, Jorge Rodriguez, Robert Harris, and Ernesto Pantoja from consideration for preferential recall to former or substantially equivalent positions; and (4) permanently transferring an employee from another facility into a unit service technician position.

The judge agreed with the General Counsel that the Respondent had an “independent unlawful purpose” motivating its decision to hire permanent replacements and, as a result, the judge found that the Respondent unlawfully replaced all striking employees.¹ The judge found it unnecessary to reach the additional Section 8(a)(3) and (1) allegations in the complaint and did not make any findings related to these allegations.

After the judge issued his decision, the Board issued *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016),² a case that analyzed and applied *Hot Shoppes* to the permanent replacement of economic strikers. We have decided to remand this case to the judge for further consideration in light of *Piedmont Gardens*, including permitting the parties to file supplemental briefs to the judge.

¹ The judge also found that the Respondent unlawfully withdrew recognition from the Union.

² Motion for reconsideration denied 364 NLRB No. 95 (2016).

In addition, we find that the additional Section 8(a)(3) and (1) allegations in the complaint, set forth above, are relevant to the analysis of whether the Respondent's decision to permanently replace striking employees was unlawful, and we instruct the judge to make credibility determinations, findings of fact, and conclusions of law as to each of these allegations.

We also instruct the judge to evaluate, in light of his findings on all of the allegations, whether the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union after receiving a decertification petition.³

We shall not order the taking of new evidence, and we instruct the judge to base his findings and conclusions on evidence that has already been adduced.

Having duly considered the matter,

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Dickie Montemayor for further appropriate action as set forth above.

³ Member Miscimarra dissented in relevant part from the Board's decision in *Piedmont Gardens*. See 364 NLRB No. 13, slip op. at 9-19. As more fully explained there in his partial dissent, Member Miscimarra disagrees with the *Piedmont Gardens* majority's expansion of the phrase "independent unlawful purpose" which, according to the Board in *Hot Shoppes*, was intended to be a limited exception to the *Hot Shoppes* general rule that, when an employer hires permanent replacements, "the *motive* for such replacements is *immaterial*." *Hot Shoppes*, 146 NLRB at 805 (citations omitted; emphasis added). In Member Miscimarra's view, consistent with the judge's opinion in *Piedmont Gardens*, an employer that hires permanent replacements has acted with an "independent unlawful purpose" only when the General Counsel proves that the employer's actions resulted from an antiunion motive that was extrinsic or unrelated to the union's strike activity and to the labor dispute giving rise to the strike. *Id.*, slip op at 15-16. Accordingly, Member Miscimarra would not remand this case for the judge to apply *Piedmont Gardens*, which he believes announced an incorrect legal standard. Member Miscimarra joins his colleagues, however, in remanding this case for the judge to make findings on the complaint allegations the judge did not reach and to consider the withdrawal-of-recognition allegation in light of the judge's findings on all the allegations.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C., November 3, 2016.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD